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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS AGUIRRE,

Defendant and Appellant.

B200600

(Los Angeles County  
Super. Ct. No. PA057327)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harvey Giss, Judge. Affirmed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

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Carlos Aguirre, also known as Mario Gomez Aguirre and Mario Alejandro (appellant), appeals from the judgment entered following a jury trial in which he was convicted of first degree robbery (Pen. Code, § 211),<sup>1</sup> carjacking (§ 215, subd. (a)), petty theft with a prior conviction (§ 666), and dissuading a witness (§ 136.1, subd. (b)(1)). With respect to his convictions of robbery, carjacking, and dissuading a witness, the jury found the personal use of a firearm. (§§ 12022.53, subd. (b) & 12022.5, subd. (a).) The trial court sentenced him to an aggregate term of 19 years 4 months in state prison.

He contends that the trial court erred when it instructed the jury with CALCRIM No. 361.

We affirm the judgment.

## **FACTS**

### **The Prosecution's Case-in-Chief**

On September 12, 2006, George Tootelian (Tootelian) was employed as a driver for Valley Transportation, which operated in the San Fernando Valley. About 12:00 a.m., he was dispatched in a Lincoln Town Car to make a pickup at a McDonald's restaurant at Sepulveda Boulevard and Parthenia Street. He picked up his passenger, appellant, and drove four miles as directed to the vicinity of Osborne Street and Laurel Canyon Boulevard in Pacoima. Tootelian stopped and asked for a fare of \$10. Appellant pointed a handgun at him, and demanded Tootelian's money, wallet, and car keys, and ordered Tootelian to rip the microphone off the Town Car's radio. Tootelian complied and gave appellant the \$40 he had in cash. Before appellant got out of the Town Car he threatened that he had Tootelian's identification and would come get him if Tootelian reported the robbery. Appellant left.

Tootelian called his boss, Gary Piskouljian (Piskouljian), who drove to Tootelian's location with an extra set of car keys.

At about 2:00 a.m. on September 14, 2006, Tootelian was dispatched to Hazeltine and Victory Boulevard in Van Nuys. When his passenger emerged from the apartment

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

house there, Tootelian recognized him as appellant, the man who had robbed him two days earlier. Tootelian refused to let appellant get into his Town Car and drove about a mile away and telephoned the police.

On September 16, 2006, Gevork Retchian (Retchian), another Valley Transportation driver, picked up appellant. When they arrived at appellant's destination, a residence near Osborne Street and Laurel Canyon Boulevard, appellant said that he had to get the money for the \$29 fare from his wife. Appellant never returned to pay his fare. The residents at that address claimed that they did not know appellant.

During the early morning hours of September 18, 2006, William Stephenson (Stephenson), another Valley Transportation driver, was dispatched to the Van Nuys Flyaway bus terminal in a Lincoln Town Car. He picked up appellant. Appellant was behaving strangely and then wanted Stephenson to drive him to an intersection near Osborne Street and Laurel Canyon Boulevard. Stephenson told appellant that one of their drivers had been robbed there and that he was uncomfortable taking a fare there. Stephenson told appellant that he would drive him to Woodman Avenue and Roscoe Boulevard. When they arrived at that intersection, Stephenson pulled into a Carl's Jr. restaurant's parking lot. Appellant told Stephenson, "I'm going to blow you away," and Stephenson could see a gun in appellant's hand. Stephenson got out of the vehicle, walked away, and telephoned the police. Appellant drove off in the vehicle.

After the vehicle was stolen, at about noon on September 18, 2006, Piskouljian drove the area around Osborne Street and Laurel Canyon Boulevard in Pacoima. He found the stolen Town Car behind a gate at the residence located at 9875 Rincon Street, which was behind an El Pollo Loco restaurant. Piskouljian had the vehicle's owner, Isaac Melamed (Melamed), meet him at the location. While Piskouljian was waiting for Melamed to arrive, he saw appellant jump over the gate to the residence. Piskouljian followed appellant, but eventually lost him at a shopping center.

The police arrived, looked for appellant at the shopping center where he had disappeared, and left. Piskouljian and Melamed waited near the gate of the Rincon Street residence. Appellant soon returned to the residence, and Piskouljian telephoned the

officers. Piskouljian also telephoned Retchian and Tootelian and had them drive to the Rincon Street residence to identify appellant. The officers contacted the residents at the house where the vehicle was located, and Piskouljian and Melamed examined the vehicle and discovered its dispatch radio and license plates were missing.

The residents at the Rincon Street residence were ordered outside, and appellant was arrested.

Martin Arellano Sanchez (Arellano) was living in the garage at the Rincon Street residence. At trial, he testified that he had told Detective Maria Roble that at about 2:00 a.m. on the morning of September 18, 2006, he had seen appellant drive into the driveway of the residence in the Town Car.

### **The Defense**

Appellant presented a partial alibi in defense. Appellant's wife testified that she lived in an apartment located at 15745 Leadwell Street in Van Nuys. At the time, she and appellant were occasionally living together. Appellant was at the family apartment overnight on September 11, 2006 and stayed until 2:00 to 2:30 a.m. the following morning. She believed that appellant slept in the back seat of her son's car, which was parked in her driveway. She did not see appellant when she awoke the next morning, and she left for work at about 5:30 a.m.

On the following days, appellant was at the family's apartment when she returned from work and until she went to bed. Appellant was not present during the early morning hours. On Saturday, September 16, 2006, appellant was at the apartment briefly and left the apartment between 10:30 a.m. and noon. Later that day, she saw him about dinner time. She did not know where he was thereafter, and he did not spend the night at her apartment. On Sunday night, appellant left the apartment at about 10:00 or 11:00 p.m. Later, her son had told her that he had dropped appellant "off."

Appellant testified that he was estranged from his wife, but lived with her periodically. He also lived with Florence McCaston, his girlfriend and the mother of one of his children. He explained that Omar Sanchez (Sanchez) lived at 9875 Rincon Street

in Pacoima and that a lot of people “crashed” there. He said that he was at the Rincon residence frequently as he purchased illicit narcotics from Sanchez.

He claimed that overnight on September 11 to September 12, 2006, he talked with his wife until 2:30 or 3:00 a.m. Then, he slept in the back seat of his son’s car in the apartment’s driveway until 6:00 a.m. At 2:00 or 2:30 a.m. on September 14, 2006, he was with his wife, and he was at her apartment all week. During the week, he slept in his son’s car. During the morning hours of September 16, 2006, he purchased some Krispy Kreme doughnuts and watched television in the family apartment with his children. On that date, he did not go to the Rincon Street residence. On September 18, 2006, he went to the Rincon Street residence and was waiting for Sanchez to arrive home so he could purchase some marijuana. The police arrived, and he was arrested.

Appellant denied that he owned a gun and denied that he had telephoned the Valley Transportation Service to drive him from Van Nuys to Sanchez’s Rincon Street residence.

### **The Rebuttal Evidence**

In rebuttal, Detective Roble testified that after appellant’s arrest at the Rincon Street residence on September 18, 2006, she interviewed Sanchez and Arellano. She told appellant that witnesses had accused him of committing a robbery at 2:00 a.m. that morning. Appellant replied that he was with a woman in Reseda until 4:00 a.m. Then he said that he did not want to talk to her anymore. The detective replied, “Fine, bring [your witness] to court.” Appellant had replied that he would. Appellant also told the detective that he had stayed four or five nights at the Rincon Street residence during the week preceding his arrest. He said nothing to the detective about being with his wife.

## **DISCUSSION**

Appellant contends that the trial court erred when it instructed the jury with CALCRIM No. 361, concerning the failure to deny or explain evidence. We disagree.

### **I. The Jury Instruction**

The jury was instructed with CALCRIM No. 361, as follows:

“If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. If the defendant failed to explain or deny, it is up to you to decide the meaning of importance, if any, of that failure.”

## **II. The Analysis**

The trial evidence overwhelmingly demonstrated appellant’s guilt. At trial, the three Town Car drivers who were the victims of theft or robbery, identified appellant as the assailant. Appellant was present at the Rincon Street residence when Piskouljian recovered the stolen Town Car, and appellant admitted to the detective that he frequented the Rincon Street residence. Two of the victims had dropped appellant off in the general area of the Rincon Street residence after service. At trial, Arellano testified that he had seen appellant driving the Town Car into the driveway of the Rincon Street residence at 2:00 a.m. shortly after the September 18, 2006 robbery.

CALCRIM No. 361 is appropriately given when a defendant’s testimony, while superficially accounting for his conduct, nonetheless appears strange or implausible. (*People v. Belmontes* (1988) 45 Cal.3d 744, 784, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) And, even if the instruction should not have been given here, it was not prejudicial. The jury instruction is expressly conditional. Thus, it is not reasonably probable that the jury would have reached a different verdict in the absence of the instruction. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471–1473.)

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, J.

DOI TODD

We concur:

\_\_\_\_\_, P. J.

BOREN

\_\_\_\_\_, J.

CHAVEZ